



**WK v FMM (Family Appeal E040 of 2023)
[2024] KEHC 1644 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E040 OF 2023
G MUTAI, J
FEBRUARY 14, 2024**

BETWEEN

WK APPELLANT

AND

FMM RESPONDENT

RULING

Introduction

1. In a judgment delivered on 6th December 2023 by the Hon Nelly Chepchirchir, PM, the Court ordered inter alia that the Respondent would have physical/actual custody, care and control of the minors and the Appellant would pay Kes.10,000.00 per month towards the food for the minors, subject to a 5% increase every three years, from the date of the judgment. The court also restricted the transfer of the children from the school(s) they are in, and ordered that transfer could only be to school(s) with similar standards.
2. The Appellant/Applicant was aggrieved by the said decision and has lodged an appeal to this Court. He also filed the application now before the Court seeking the following orders:-
 - a. Spent;
 - b. That a stay of the part of the judgment on orders issued on 6th December 2023 limiting the change of schools to a public and monthly contribution of Kes.10,000.00 in Children Cause 464 of 2023 be and is hereby issued pending interpartes gearing and determination of the application herein;
 - c. That a stay of the part of the judgment on orders issued on 6th December 2023 limiting the change of schools to a public and monthly contribution of Kes.10,000.00 in Children Cause



464 of 2023 be and is hereby issued pending interpartes gearing and determination of the appeal.

- d. That the applicant be issued with certified copies of typed proceedings and judgment for purposes of preparing the record of appeal; and
 - e. That the costs be provided for.
3. The application is based on the grounds in the body of the said Motion and also in the Supporting Affidavit sworn by the Appellant/Applicant on 19th December 2023. He contends that the Court below erred by denying him the option to transfer children to public school as he cannot afford private education. He averred that the order to pay Kes.10,000.00 to the Respondent was equally onerous as it was issued without consideration of the fact that he is not employed and lacks constant income with which he can settle the said amount. Mr WK stated that he was aggrieved by the decision of the Court below and had filed an appeal against it without delay. The Respondent, he urged, would not be prejudiced if the orders sought herein are granted, whereas he, on the other hand, would, where the orders he seeks were denied. He urged that the application was in the best interest of justice and in keeping with the principle that there should be equal parental responsibility.
 4. The Appellant/Applicant attached a copy of the Memorandum of Appeal and the impugned judgment of the Court below.
 5. The application of stay of execution of the impugned judgment was opposed by the Respondent vide a Replying Affidavit sworn on 1st February 2024. The Respondent deposed that the application was brought before the Court maliciously, in bad faith, with the intention of defeating and or delaying the cause of justice. She averred that the Appellant/Applicant had the ability to meet the financial needs of the suit minors as ordered by the Court:-

“since he has always been able to take care of the children’s private schooling since the oldest two children started school.”

6. It was urged that the application was not in the children's best interest as it would interrupt their schooling. Regarding his ability to meet the obligation the Court imposed on him, the Respondent stated that the Appellant/Applicant is a landlord living in his own home and also grows and sells trees in order to make a living, whereas:-

“I was out of a job for years because the Applicant herein told me he wanted me to take care of the family.”

7. She deposed that if the orders sought by the Appellant/Applicant were granted, she would be unable to provide for the children as she is jobless. She urged that the stay of the judgment would be detrimental to the children, defeat justice and not be in the best interest of the suit minors. She, therefore, pleaded with this Court to safeguard the children and protect their welfare and best interests.
8. The application was heard on 7th February, 2024. The Appellant/Applicant is a pro se litigant. The Respondent, on the other hand, was represented by Mr Obonyo.

Submissions of the Applicant

9. Mr WK submitted that he was dissatisfied with the decision of the children's Court. The Court ordered him to pay Kes.10,000.00, which he submitted he could not raise. He stated that the children are 11, 7 and 3 years old. He offered to pay Kes.4,000.00 since he also takes care of school fees. He urged that



he should be allowed to take the children to a school he could afford. For those reasons, he urged that I allow the application.

Submissions of the Respondent

10. Mr. Obonyo, learned counsel for the Respondent, submitted that the Court below considered the submissions of the parties and arrived at the decision to compel the Appellant/Applicant to pay Kes.10,000.00 based on his assessed capacity. He argued that Kes.10,000.00 cannot take care of children in the current economic condition. Mr. Obonyo stated that his client houses the children and buys them clothes. The Appellant/Applicant on the other hand wanted to avoid shouldering his obligation to provide for the children equally with the mother. He argued that Mr WK hadn't come to Court with clean hands, having paid school fees late and sending small sums of money such as Kes.10,000.00 for the maintenance of the children. It was also argued that the Appellant/Applicant hadn't provided evidence of hardship. Mr. Obonyo thus submitted that I should decline to issue the orders sought by the Appellant/Applicant.

Response by the Appellant/Applicant

11. In response, Mr. WK submitted that no evidence had been provided by the Respondent showing that he is a land broker or a businessman. He averred that he had not opposed all the orders issued by the Court below and was ready to pay for NHIF and provide the children with clothes. He submitted that he was living on borrowing, and had done so since 2018.

Analysis and Determination

12. Both the appeal and the application relate to the welfare of children aged 11, 7 and 3. The Court must, therefore, take into consideration the constitutional and statutory provisions on children when making a determination.
13. Article 53(2) of the *Constitution* of Kenya, 2010 provides that:-

“A child’s best interests are of paramount importance in every matter concerning the child.”

14. The Constitutional edict is echoed in section 8(1), (2) and (3) of the *Children Act*, 2022, which provides as follows:-

“(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

- (a) the best interests of the child shall be the primary consideration;
- (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

- (a) safeguard and promote the rights and welfare of the child;
- (b) conserve and promote the welfare of the child; and



(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.”

15. It must be borne in mind at the outset that the best interest that the Court must bear in mind is that of the children. The interests of the parents, though relevant, are secondary.

16. The Appellant/Applicant seeks to stay the execution of the judgment of the children's Court pending appeal. The appeal is primarily on the quantum of maintenance payable, which the Appellant/Applicant feels is oppressive on the ground that he is currently indigent. To make a determination, the Court must consider the provisions of order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides that:-

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

But do so, bearing in mind the paramountcy of the children's best interest.

17. In my view, a stay of execution of a judgment pursuant to an application based primarily on quantum should rarely be granted unless in the clearest and most exceptional of cases. Justice is served in such matters if the appeal is heard expeditiously. I am in agreement with what the Court stated in DOB v DMA [2021]eKLR, where the Court held that:-

“In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children's cases is that the suspension of the maintenance order is not in the best interests of the child.”

18. In RWW v EKW [2019]eKLR the Court stated

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”



19. Although the Appellant/Applicant submitted that he was under severe hardship, he failed to provide any documentary evidence of his alleged indigence or of a material change in his circumstance that would warrant this extraordinary remedy's issuance. Since he was privy to the decision to take the children to a private school, based on his ability, he had the burden of proving that there was a genuine change in his circumstances justifying taking the children to public school or otherwise degrading the living conditions he had accustomed them. He provided no such proof.
20. I do not see how it could be said that he would suffer a substantial loss as a result of paying for the maintenance of his own children. Although the application was filed without delay, the test in Order 42 Rule 6 of the *Civil Procedure Rules* is conjunctive, not disjunctive; all the elements must be present for the court to exercise its discretion.
21. The Appellant/Applicant offered to pay Kes.4,000 per month. This amount, noting the current cost of living crisis in the country, is too modest. The said amount would not be in the best interest of the three minors whose sustenance is on the line.
22. This Court, therefore, finds no merit in the application. The same is dismissed.
23. An award of costs in matters of this nature is not an appropriate remedy. Each party shall, therefore, bear own costs.
24. In the interests of justice, the appeal will be heard on a priority basis.

Orders accordingly.

DATED AND SIGNED AT MOMBASA ON THE 14TH DAY OF FEBRUARY 2024.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr WK - Pro se litigant;

Mr Obonyo for the Respondent; and

Arthur - Court Assistant.

